

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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APR 19 1996

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

In the Matter of)
)
Policy and Rules Concerning the)
Interstate, Interexchange Marketplace)
)
Implementation of Section 254(g) of the)
Communications Act of 1934, as amended)

CC Docket No. 96-61

DOCKET FILE COPY ORIGINAL

COMMENTS OF VANGUARD CELLULAR SYSTEMS, INC.

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SUMMARY

These comments supplement Vanguard's filings on the Commission's *BOC Out-of-Region NPRM*. The record in that proceeding shows that the Commission must adopt safeguards for BOC out-of-region long distance service. Given the market power and size of the BOCs, there is no justification for straying from that course in this proceeding. Thus, the safeguards proposed in the out-of-region proceeding, which now apply to non-BOC LECs, also should be applied to the BOCs.

BOC provision of interexchange service creates significant risks to competition. The BOCs control bottleneck local facilities in their regions, so they can affect the cost structures of their competitors. This is particularly a problem in the case of CMRS, where a BOC could be involved in the origination, interexchange transmission and termination of a call. The size of the BOCs also makes it easier for them to engage in anticompetitive activities. The safeguards the Commission proposed in the *BOC Out-of-Region NPRM* are no more onerous than those imposed on independent LECs and less burdensome than other separate subsidiary requirements that have been applied to BOCs in the past.

The Commission also should recognize that BOC dominance in the access market limits the value of the market power analysis described in the Notice. Because the BOCs dominant the market for an essential input to interexchange services — access — they can affect the competitive interexchange market. Indeed, relatively small abuses of market power in access could have significant effects in the interexchange market because of the competitive nature of that market. The BOC ability to influence the interexchange marketplace is an important reason to adopt the safeguards proposed in the *BOC Out-of-Region NPRM*.

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To: The Commission

COMMENTS OF VANGUARD CELLULAR SYSTEMS, INC.

Vanguard Cellular Systems, Inc. ("Vanguard"), by its attorneys, hereby submits its comments in response to the Commission's Notice of Proposed Rulemaking in the above-referenced proceeding.^{1/}

I. Introduction

Vanguard is a long term provider of cellular service. Vanguard entered the cellular marketplace in 1984 and now is one of the 20 largest cellular carriers in the country. Vanguard's cellular systems serve 26 markets in the eastern half of the United States, cover a geographic area containing more than 7.5 million people and serve more than 400,000 subscribers.

These comments focus on the appropriate safeguards for Bell Operating Company ("BOC") provision of interexchange services and are intended to supplement Vanguard's

^{1/} Notice of Proposed Rulemaking, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Dkt. No. 96-61, rel. March 26, 1996 (the "Notice").

comments in the BOC out-of-region proceeding.^{2/} In many of its markets, Vanguard competes against the cellular affiliates of BOCs, including affiliates of NYNEX, BellSouth, and Bell Atlantic. Thus, Vanguard has a strong interest in assuring that these BOCs do not take advantage of their affiliation with their related cellular carriers to engage in anticompetitive behavior. At the same time, Vanguard recognizes the Congressional intent, expressed in the Telecommunications Act of 1996 (the "1996 Act"), to permit BOC entry into interstate, interexchange services where doing so will enhance competition. Any rules or modification of existing rules the Commission adopts in this proceeding must balance the need to forestall anticompetitive behavior against the intent to enhance competition through BOC offerings of interexchange services.

The Commission achieved the proper balance between these competing interests in its proposed rules for BOC out-of-region interexchange offerings. *See BOC Out-of-Region NPRM*. In that proceeding the Commission proposed to require BOCs to either accept dominant carrier regulation or operate their out-of-region interexchange operations through separate subsidiaries to guard against BOC anticompetitive behavior.^{3/} The Commission should not disturb the separate subsidiary rules and should apply them to BOC out-of-region interexchange service.

^{2/} *Bell Operating Company Provision of Out-of-Region Interstate, Interexchange, Services*, Notice of Proposed Rulemaking, CC Docket No. 96-21, FCC 96-59 (rel. Feb. 14, 1996) (*BOC Out-of-Region NPRM*). Copies of Vanguard's comments and reply comments in that proceeding are attached to these comments as exhibits 1 and 2, respectively, and hereby are incorporated by reference.

^{3/} Notice at ¶ 57. *See also BOC Out-of-Region NPRM* at ¶ 11; *Competitive Common Carrier*, Fifth Report and Order, 98 FCC 2d 1191, 1198 (1984).

II. BOC Interexchange Service Should Be Governed by the Rules that Now Govern Independent LECs.

The Notice seeks comment on whether, if the Commission modifies its treatment of independent LECs, it "should apply these same requirements to BOC provision of out-of-region interstate interexchange services " Notice at ¶ 61. In the BOC out-of-region proceeding, the Commission tentatively concluded that BOCs would have to provide interexchange service pursuant to a separate subsidiary requirement or accept regulation as a dominant carrier. *BOC Out-of-Region NPRM* at ¶ 11. As Vanguard showed in its comments in that proceeding, the Commission should apply these rules to the BOCs to protect consumers and enhance competition.

A. There Are Significant Risks to Competition from BOC Provision of Interexchange Services.

The Commission properly identified the risks that arise from BOC provision of interexchange services in the *BOC Out-of-Region NPRM*, and these risks are still present. Nothing has changed since the date of the *BOC Out-of-Region NPRM* to eliminate these risks. The BOCs still have significant incentives to engage in cost-shifting, discrimination and other anti-competitive behavior. Moreover, they will be able to engage in those activities because they control "bottleneck local exchange facilities in their in-region states." *BOC Out-of-Region NPRM* at ¶ 9. As the Commission long ago established, such anticompetitive behavior hurts both consumers and competitors.^{4/}

There is even more reason to require safeguards in the context of the CMRS marketplace. Vanguard's market position highlights the real anticompetitive risk posed to

^{4/} See, e.g., *Second Computer Inquiry*, Final Order, 77 F.C.C.2d 384, 463 (1980) (discussing benefits of preventing cross-subsidization) ("*Computer II Order*").

CMRS providers faced with competition from BOC affiliates that have significant incentives to shift costs from interexchange to local services. Most independent LECs do not have significant interest in cellular or other CMRS services, but the BOCs are among the largest CMRS providers. BOC involvement in CMRS gives them the opportunity to be involved in each of the three elements of an interexchange call — as the originating carrier, the interexchange carrier and the terminating carrier. At each intermediate point, the opportunities and benefits of shifting costs increase ^{5/}

As suppliers of an essential intermediate good, the BOCs are in a position to affect the cost structures of their competitors. For instance, Bell Atlantic-NYNEX Mobile could carry interexchange calls to Philadelphia, inside the Bell Atlantic region, from customers in its Phoenix cellular system, outside the Bell Atlantic region. Any increase in the charges imposed by Bell Atlantic for terminating this traffic will raise the costs of a non-affiliated CMRS providers (and other interexchange carriers) terminating calls over the same route. This increased cost must be absorbed by the non-affiliated CMRS provider. However, it will not injure the BOC because raising the cost to its CMRS affiliate is merely a pocket-to-pocket transfer.

Every BOC has this opportunity because every BOC also has out-of-region CMRS interests. *See* Exhibit 1 at 4. PCS has only increased the reach of BOC CMRS operations.^{6/}

^{5/} There is scholarly agreement — even among economists not inclined to penalize vertical integration — that where a vertically integrated firm with market power could foreclose a related market and where there is not strong evidence of enhanced efficiencies, regulatory intervention may be appropriate. HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY*, § 9.3a, *Strategic Control of Inputs* (1994). The BOCs have not offered evidence of significant efficiencies that will be lost if they enter the interexchange market on a structurally separated basis.

^{6/} BOC PCS licenses cover a combined population of more than 114,000,000
(continued...)

The potential for anticompetitive behavior is particularly strong in the northeast part of the country, where Bell Atlantic-NYNEX Mobile, a joint venture of Bell Atlantic and NYNEX, operates. As described in Vanguard's comments in the BOC out-of-region proceeding, NYNEX can now offer long distance service to Bell Atlantic-NYNEX Mobile customers in the Bell Atlantic region, subject only to the safeguards the Commission adopts in this proceeding. Similarly, Bell Atlantic could offer long distance service to Bell Atlantic-NYNEX customers in the NYNEX region, including the major metropolitan areas of New York and Boston. NYNEX and Bell Atlantic have additional incentives to engage in anticompetitive behavior because doing so could benefit both their long distance operations and their cellular affiliate. See Exhibit 1 at 5

The Commission also should focus on the difference in size between independent LECs and BOCs. Each of the BOCs serves, on average, about one-eighth of all U.S. telephone subscribers in largely contiguous regions.^{7/} This means that BOCs receive more calls than other companies and, as a consequence, have more opportunities to manipulate the price and quality of terminating access than other companies. The large size of the BOCs also provides them with more opportunities for cost shifting than are available to independent LECs because there are more services and organizational niches to which interexchange costs can be shifted. The proposed merger of SBC Corp. and Pacific Telesis and the renewed

^{6/} (...continued)
people. Applications for A and B Block Broadband PCS Licenses, *Order*, DA 95-1411 (Wireless Telecom. Bur.), rel. June 23, 1995, at Appendix A; Public Notice, "Auction Notice and Filing Requirements," Rep. No. AUC-94-04, Auction No. 4, rel. Sep. 19, 1994, Appendix.

^{7/} GTE is comparable in size to the BOCs, but does not have service areas comparable to the large, contiguous BOC service areas.

indications that Bell Atlantic and NYNEX may merge will widen the size differential even further.^{8/}

Because of the contiguous service areas of its parent company, the incentives to engage in cost-shifting are even more pronounced for Bell Atlantic-NYNEX Mobile. As much as 60 percent of all U.S. interexchange traffic involves the Bell Atlantic region, the NYNEX region, or both. In addition, given Bell Atlantic-NYNEX Mobile's aggressive efforts to offer long distance service to all of its cellular customers, it is important to put safeguards into place promptly. Safeguards will not preclude Bell Atlantic-NYNEX Mobile customers from obtaining long distance service in any way that is permitted under the 1996 Act. Rather, the safeguards are only structural in nature.

The incentives for anticompetitive behavior for landline interexchange service, by themselves, are enough to justify the adoption of safeguards, as the Commission has done for independent LECs. When the additional incentives for anticompetitive conduct created by BOC interests in CMRS providers are considered, the case for safeguards becomes compelling.

B. There Is No Reason Not to Require Safeguards for BOC Interexchange Services.

In the BOC out-of-region proceeding, the BOCs argued that the proposed safeguards were onerous or contrary to the 1996 Act. In fact, the safeguards proposed by the Commission are no more onerous than those the Commission has adopted in the past and the 1996 Act does not affect the Commission's discretion to adopt appropriate safeguards for BOC services.

^{8/} See Mark Landler, *Bell Atlantic And Nynex Are Said to Be Close to a Deal*, N.Y. TIMES, Apr. 18, 1996, at D1.

The separate subsidiary requirement proposed for the BOCs is not as rigorous as the separate subsidiary mandated under the Commission's *Computer II* rules for BOC provision of information services.^{9/} Indeed, the separation proposed in the Notice is much less stringent than the subsidiary required by the 1996 Act for BOC in-region interexchange services^{10/} or those imposed by the MFJ court less than a year ago in the wireless interexchange services.^{11/}

Some BOCs have claimed that the 1996 Act precludes the Commission from adopting safeguards for provision of out-of-region interexchange service. This claim is incorrect. The 1996 Act is silent as to the regulatory safeguards that the Commission may adopt for out of region or "incidental" services. The 1996 Act merely specifies that the separate subsidiary requirement found in 272(c) does not apply for out-of-region services. Even if the 1996 Act did forbid the Commission from requiring a separate subsidiary, the proposed rules do not contain a separate subsidiary requirement. Instead, they give the BOCs the choice of dominant carrier regulation or operation through a separate subsidiary.^{12/}

The safeguards amount in large part, to accounting requirements that will permit scrutiny of BOC activity. *BOC Out-of-Region NPRM* at ¶ 4. Requiring the BOCs to use separate facilities out of region cannot impose a hardship on the BOCs because they do not have any significant landline facilities outside their regions. Requiring the BOCs to treat long distance service as an unregulated service also will not impose unreasonable compliance

^{9/} See generally *Computer II Order*, 77 FCC 2d 384.

^{10/} See 47 U.S.C. § 272(b).

^{11/} See Exhibit 1 at 8 (citing *United States v. Western Electric Company*, Civ. Act. No. 82-0192 (D.D.C. Apr. 28 1995)).

^{12/} See Exhibit 2 at 8 n. 8.

costs. Treating out-of-region long distance as an unregulated service for accounting purposes is merely a matter of setting up the initial accounting for service, not changing existing procedures.

Taken together, the safeguards proposed for BOC out-of-region services are not particularly onerous. Rather, they represent the minimum necessary to protect against anticompetitive behavior.

III. BOC Dominance in the Local Exchange Market Necessitates Safeguards in the Interexchange Market.

In the Notice, the Commission concludes that the relevant product market in this proceeding is defined as "all interstate, domestic, interexchange telecommunications services" a definition that was used in the order reclassifying AT&T as non-dominant.^{13/} The Notice asks for comment on whether an alternate, more narrow definition of the relevant product market is appropriate for measuring BOC market power. The Notice suggests that there may be "special circumstances" in which treating interexchange service as a national market "will not be sufficient for purposes" of examining whether a carrier or group of carriers acting together has market power.^{14/} While the basic analysis of the interexchange market is reasonable, the Commission should recognize the limits of the market power analysis it used in the *AT&T Reclassification Order* when applied to the BOCs.

The Commission's general analysis of the interexchange market is accurate today because the interexchange market is competitive and because the existing rules are designed

^{13/} *AT&T Reclassification Order* at ¶ 12.

^{14/} Notice at ¶ 53.

to limit opportunities for independent LECs to affect the interexchange market. However, BOC entry into interexchange services changes this analysis.

The Commission's analysis would be unaffected by BOC entry into interexchange markets if the market for inputs necessary to provide interexchange service also was competitive. This is not the case: The market for access services necessary to provide interexchange service is not competitive and is dominated by the BOCs within their regions. As the Supreme Court has noted, when a monopolist has gained market power in one market it may "exploit [its] dominant position in one market to expand [its] empire into the next."^{15/} Consequently, the BOCs could leverage their market power in the markets for interexchange access into out-of-region and incidental interexchange services.

The Commission has long experience with the ability of BOCs to leverage monopoly power in local exchange markets into other offerings.^{16/} In the CMRS context, BOCs use their local exchange monopolies to force CMRS providers to accept interconnection charges that far exceed costs. These high interconnection charges greatly limit the ability of independent CMRS providers to compete with the BOCs or with BOC-affiliated CMRS providers.

BOC leveraging and exclusionary conduct can take many forms. In one instance, a CMRS provider was prevented from advertising its cellular offerings in Veteran's Stadium in Philadelphia, Pennsylvania when Bell Atlantic threatened to terminate *all* of its advertising if

^{15/} *Eastman Kodak Co. v. Image Technical Services*, 112 S.Ct. 2072, 2089 n. 29. (1992).

^{16/} In the past, BOCs have cross-subsidized enhanced service offerings by recovering the costs of enhanced ventures through their captive rate base. *See, e.g., Southwestern Bell Tel. Co.*, Order to Show Cause, AAD 95-32, FCC 95-31 (released March 3, 1995).

stadium officials did not agree to reserve all advertising space for cellular service for Bell Atlantic's cellular affiliate. Bell Atlantic was able to leverage its control over the local exchange, and the advertising budget used to promote its landline system, to exclude a competitor from marketing in the same forum.^{17/} There is no reason to assume that the same incentives to leverage local exchange market power into the CMRS market are not present in the \$70 billion interexchange market.

Because the BOCs control an essential component of interexchange service they will have the ability to affect the assembled price of interexchange service and, therefore, to distort the interexchange market. For example, increased charges for interstate access will reduce the ability of all competitors to reduce their prices. An inability to reduce prices could cause a reduction in network usage which cannot redound to the benefit of competition and the consumers it is meant to serve. Likewise the ability for a BOC to discriminate in the terms of interstate access provided to their affiliates means that BOCs have the ability to affect the price of interexchange service originated in-region and terminated out-of-region.

It is important to recognize that anticompetitive BOC practices actually could be more significant because the interexchange market is competitive. Even slight advantages from cost-shifting, discrimination or manipulation of access charges could have a significant effect in the competitive interexchange market if they lower the apparent cost of BOC long distance service or raise the apparent cost of non-BOC service.^{18/} For this reason, the Commission

^{17/} Comments of Comcast Corporation, *Application for Consent to Transfer of Control of Radio Licenses*, Report No. CL-95-17, File No. 00762-CL-AL-1 (Dec. 28, 1994), at 18.

^{18/} For instance, even a difference of a few days between a BOC and a non-BOC for provisioning the facilities necessary for high capacity services could give the BOC a significant advantage in capturing customers in that market.

need not find rampant cost-shifting or price discrimination to properly find that the BOCs should provide out-of-region and incidental long distance on a separate subsidiary basis.

Moreover, the impact of these possible anticompetitive practices is exacerbated by the size of the BOCs. Indeed, the size of the BOCs increases the likelihood that relatively small anticompetitive practices will have significant effects on the interexchange marketplace.

The BOC's power to affect the interexchange market does not require the Commission to fundamentally alter its analysis of competition in the interexchange market as a whole. However, it does require the adoption of safeguards to limit the ability of BOCs to affect the interexchange market through their local exchange monopolies and demonstrates that the concerns Vanguard raised in the BOC out-of-region proceeding must be accounted for in this proceeding as well.

IV. Conclusion

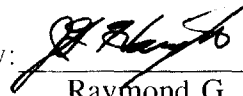
The Commission has proposed reasonable safeguards for BOC provision of out-of-region interexchange services in the BOC out-of-region proceeding. These safeguards are necessary to limit the ability of BOCs to engage in cost-shifting, discrimination and other anticompetitive activities. The safeguards are especially important for CMRS, where the BOCs have additional incentives and a greater ability to engage in anticompetitive behavior. Moreover, the proposed safeguards are the minimum necessary to protect consumers and competition, and impose a very small burden on BOC provision of interexchange service.

For all these reasons, Vanguard Cellular Systems, Inc. urges the Commission to apply the current safeguards for independent LECs to BOC provision of out-of-region and incidental interexchange services, regardless of any changes in the rules governing independent LECs.

Respectfully submitted,

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Exhibit 1

COMMENTS OF VANGUARD CELLULAR SYSTEMS, INC.

Bell Operating Company Provision of Out-of-Region
Interstate, Interexchange Services

CC Docket No. 96-59

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)

Bell Operating Company)

Provision of Out-of-Region)

Interstate, Interexchange Services)

CC Docket No. 96-21

To: The Commission

MAR 13 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

COMMENTS OF VANGUARD CELLULAR SYSTEMS, INC.

Vanguard Cellular Systems, Inc. ("Vanguard"), by its attorneys, hereby submits its comments in response to the Commission's Notice of Proposed Rulemaking in the above-referenced proceeding.^{1/} Vanguard supports adoption of the safeguards proposed in the Notice, which are no more burdensome on the Bell Operating Companies (the "BOCs") than the safeguards now in place for interexchange service offered by non-BOC local exchange carriers. Given the unique risks that arise from BOC provision of interexchange service, the Commission would have ample justification to adopt more rigorous safeguards if it so desired.

I. INTRODUCTION AND SUMMARY

Vanguard is a long term provider of cellular service and is one of the major carriers operating today. Vanguard entered the cellular marketplace in 1984 and now is one of the 20 largest cellular carriers in the country. Vanguard's cellular systems serve 26 markets in the

^{1/} Notice of Proposed Rulemaking, *Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services*, CC Dkt. No. 96-21, rel. Feb. 14, 1996 (the "Notice"). The comment date for the Notice was based on Federal Register publication, which occurred on February 21, 1996. See 61 Fed. Reg. 6607 (Feb. 21, 1996). Thus, these comments are timely filed.

eastern half of the United States; cover a geographic area containing more than 7.5 million people; and have approximately 400,000 subscribers.

In many of its markets, Vanguard competes against the cellular affiliates of BOCs, including affiliates of Bell Atlantic, NYNEX and BellSouth. Thus, Vanguard has a strong interest in assuring that these competitors do not take advantage of their affiliation with BOCs to engage in anticompetitive behavior. At the same time, Vanguard is cognizant of the Congressional intent, expressed in the Telecommunications Act of 1996 (the "1996 Act"), to permit BOC entry into interexchange services where doing so will enhance competition. Any rules the Commission adopts must balance the need to forestall anticompetitive behavior against the intent to enhance competition through BOC offerings of interexchange services.

The rules proposed in the Notice achieve, at least in rough terms, an appropriate balance between these competing interests. While, as shown below, there are significant risks to BOC entry into even out-of-region interexchange markets (risks that are greater where a BOC affiliate provides cellular service), it is reasonable for the Commission to apply the same rules to BOCs that it applies to other local exchange carriers. Consequently, Vanguard supports the Commission's proposals to: (1) require BOCs to choose between offering their out-of-region interexchange services through a separate subsidiary or being treated as dominant carriers for those services; and (2) treat interLATA services as unregulated services for the purposes of the joint cost rules and affiliate transactions.

II. Safeguards Are Needed for BOC Provision of Interexchange Services, Especially in the Case of Commercial Mobile Radio Service.

The Notice identifies certain risks that will arise when BOCs enter the interexchange marketplace, including shifting of costs from interexchange services to local exchange

services. Notice at ¶ 10. As shown below, these risks are real, and in fact are heightened in the context of commercial mobile radio services ("CMRS") such as cellular.

Consequently, there is a need for safeguards to govern BOC provision of interexchange services, including out-of-region long distance

First, the Commission has properly identified the risks that arise from BOC provision of interexchange services. The BOCs will have significant incentives to engage in cost-shifting, discrimination and other anti-competitive behavior. They also will be able to engage in those activities because they control "bottleneck local exchange facilities in their in-region states." *Id.* at ¶ 9. As the Commission long ago established, such anticompetitive behavior hurts both consumers and competitors.^{2/}

These concerns about anticompetitive behavior led the Commission to conclude that independent LECs providing interexchange services should be required either to offer those services through a separate subsidiary or to accept dominant carrier regulation of their interexchange services. As the Notice explains, the separate subsidiary requirement for these purposes is not as rigorous as the subsidiary mandated under the Commission's *Computer II* rules for BOC provision of information services. *Id.* at ¶ 10. Indeed, the separation proposed in the Notice is much less stringent than the subsidiary required for BOC in-region interexchange services by the 1996 Act. *See* 47 U.S.C. § 272(b).

The risks of anticompetitive behavior are heightened for BOC interexchange offerings because the BOCs are in a better position to engage in anticompetitive behavior than almost

^{2/} *See, e.g.,* Second Computer Inquiry, *Final Order*, 77 F.C.C.2d 384, 463 (1980) (discussing benefits of preventing cross-subsidization).

any other LEC.^{3/} Each of the BOCs serves, on average, about one-eighth of all telephone subscribers, and BOC regions are largely contiguous. This means that BOCs receive more calls than other companies and, as a consequence, have more opportunities to manipulate the price and quality of terminating access than other companies. The large size of the BOCs also provides them with more opportunities for cost shifting than are available to independent LECs because there are more services and organizational niches to which interexchange costs can be shifted.

There is even more reason to require safeguards in the context of the CMRS marketplace. Most independent LECs do not have significant interests in cellular or other CMRS services, but the BOCs are among the largest CMRS providers. BOC involvement in CMRS gives them the opportunity to be involved in each of the three elements of an interexchange call — as the originating carrier, the interexchange carrier and the terminating carrier, increasing both the opportunities to shift costs and the benefits of doing so. This is not an idle concern. For instance, Bell Atlantic-NYNEX Mobile could carry interexchange calls to Philadelphia, inside the Bell Atlantic region, from customers in its Phoenix cellular system, outside the Bell Atlantic region. Moreover, every BOC has out-of-region CMRS interests, ranging from the portion of Arizona covered by Pacific Bell's Los Angeles MTA PCS license to Bell Atlantic's extensive interests in the northeastern and southwestern parts

^{3/} GTE is comparable in size to the BOCs, but does not have service areas comparable to the large, contiguous BOC service areas. In addition, GTE appears to be covered by the existing rule for independent LECs.

of the country. PCS has only exacerbated the problem as the BOCs have made significant efforts to expand the footprints of their CMRS coverage.^{4/}

While the risks of anticompetitive behavior generally are heightened by BOC involvement in CMRS, they are particularly great in the northeastern part of the country, where Bell Atlantic-NYNEX Mobile, a joint venture of Bell Atlantic and NYNEX, operates. For instance, in Allentown, Pennsylvania, where Vanguard operates the Block A cellular system, Bell Atlantic-NYNEX operates the Block B system. Because Allentown is outside the NYNEX region, NYNEX can now offer long distance service to Bell Atlantic-NYNEX customers, subject only to the safeguards the Commission adopts in this proceeding. (Similarly, Bell Atlantic could offer long distance service to Bell Atlantic-NYNEX cellular customers in the NYNEX region, including the major metropolitan areas of New York and Boston.) NYNEX's interest in the Allentown cellular system and other Bell Atlantic-region cellular systems gives it additional incentives to engage in anticompetitive behavior because such behavior could benefit both its long distance operations and its cellular affiliate. Bell Atlantic has the same incentives for those cellular systems in the NYNEX region.

Moreover, because of the unique geographic relationship between Bell Atlantic-NYNEX Mobile and its two owners, these incentives are greater than they would be for other BOCs, such as Ameritech or BellSouth. Given that as much as 60 percent of all interexchange traffic involves the Bell Atlantic region, the NYNEX region or both, the

^{4/} BOC PCS licenses cover a combined population of more than 114,000,000 people. Applications for A and B Block Broadband PCS Licenses, *Order*, DA 95-1411 (Wireless Telecom. Bur.), rel. June 23, 1995, at Appendix A. Public Notice, "Auction Notice and Filing Requirements," Rep. No. AUC-94-04, Auction No. 4, rel. Sep. 19, 1994, Appendix.

incentives for anticompetitive behavior by Bell Atlantic and NYNEX are high.^{5/} Bell Atlantic NYNEX Mobile's recent announcements that it intends to offer long distance service to all of its cellular customers and that it has entered a long distance resale agreement demonstrate that the risks are not remote but are occurring right now.

The significant incentives to anticompetitive behavior for landline interexchange service, by themselves, are enough to justify the adoption of safeguards, as the Commission has done for independent LECs. When the additional incentives for anticompetitive conduct created by BOC interests in CMRS providers are considered, the case for safeguards becomes compelling.

III. The Proposed Safeguards Are Not Onerous.

Logic and the evidence of the range of BOC market power demonstrates that safeguards for BOC provision of interexchange service are necessary, and almost certainly more necessary for the BOCs than for independent LECs. In this context, the safeguards proposed in the Notice are not excessive and, in fact, may be less stringent than the Commission might otherwise choose to impose. In fact, the Commission's proposed safeguards are less burdensome than those imposed less than a year ago by the MFJ Court for wireless interexchange service. Given the BOCs' market power in local exchange service, it is perfectly reasonable for the Commission to adopt the same safeguards for BOCs as for independent LECs.

First, the safeguards proposed in the Notice are not particularly onerous. They amount, in large part, to accounting requirements that will permit scrutiny of BOC activity.

^{5/} See Communications Daily, Dec. 19, 1995, at 3.

See Notice at ¶ 4. While the separate affiliate is required to use separate facilities, that should impose little or no additional burden on BOC provision of services outside their local exchange service areas.^{6/} If a BOC does not wish to comply with these requirements, it can opt to be treated as a dominant carrier.

Similarly, it will not be burdensome for the BOCs to comply with the requirement to treat long distance as an unregulated service. BOCs account for certain services on this basis already. Moreover, treating out-of-region long distance as an unregulated service for accounting purposes is merely a matter of setting up the initial accounting for service, not changing existing procedures.

The safeguards proposed in the Notice are much less onerous than those imposed by the MFJ Court less than a year ago in the *Wireless Interexchange Opinion* ^{7/}. Under the waiver granted in that opinion, the BOCs were permitted to offer wireless interexchange services, subject to a series of conditions. The conditions included: (1) offering wireless interexchange service through a separate subsidiary; (2) developing detailed equal access plans to prevent discrimination; (3) offering only resold interexchange service rather than using the BOC's facilities; (4) waiting to offer interexchange service until bypass services are available between the MTSO and interexchange carrier facilities; and (5) separate marketing of interexchange wireless service and local wireless service. The MFJ Court imposed these conditions because it found, as did the Justice Department in evaluating the proposed waiver,

^{6/} The BOCs do not have any significant landline facilities outside their regions.

^{7/} See Opinion, *United States v. Western Electric Company*, Civ. Act. No. 82-0192. (D.D.C. Apr. 28, 1995) (the "*Wireless Interexchange Opinion*").

“that the conditions would not eliminate the risk of discrimination, but instead would merely reduce the risk to ‘acceptable levels.’” *Wireless Interexchange Opinion* at 20.

The proposed rules would give the BOCs considerably more freedom than they were granted in the *Wireless Interexchange Opinion*. Indeed (and consistent with the 1996 Act), the BOCs would not be required to satisfy any conditions before they begin providing out-of-region interexchange services.^{8/} In addition, under the proposed rules they could offer their services either on a resale basis or through their own facilities. They also would not be subject to the waiver’s requirement that they market local (e.g., cellular) and long distance services separately. In short, the proposed rules are considerably more liberal than the conditions in the *Wireless Interexchange Opinion*.^{9/}

8/ Some BOCs have indicated that they object even to the requirements proposed in the Notice because they believe that the 1996 Act does not permit the Commission to impose a separate subsidiary requirement for out-of-region services. That is untrue. The 1996 is silent as to the regulatory safeguards that the Commission may adopt for out-of-region services. All the 1996 Act does is specify that the separate subsidiary described in Section 272(c) shall not be required for out-of-region services. See 47 U.S.C. § 272(a). As described above, the subsidiary proposed in the Notice is less onerous than the Section 272(c) subsidiary. Even if the 1996 Act did forbid the Commission from requiring a separate subsidiary, the proposed rules do not contain such a requirement. Instead, they would give BOCs the choice of dominant carrier regulation (which is not affected by the 1996 Act) or operation through a separate subsidiary. Notice at ¶13.

9/ It should be noted, however, that the terms of the *Wireless Interexchange Opinion* remain in effect for in-region wireless interexchange service, such as any long distance service provided by Bell Atlantic from its Allentown system. While the 1996 Act grants BOCs the authority to provide “incidental” interLATA CMRS services, that authority should be read to permit only such interLATA services as are necessary to offer CMRS in the normal course of business, and not to permit offering regular long distance service to CMRS customers. See 47 U.S.C. § 272(b)(3), (g). It is noteworthy that each of the services included within the definition of “incidental” services is provided in connection with a service that is not itself an interexchange telecommunications service, e.g., “signaling information used in connection with the provision of telephone exchange service or exchange access by a local exchange carrier.” 47 U.S.C. § 272(g)(5). The conference report on the 1996 Act also describes the incidental services exception as applying to “services . . . ‘incidental’ to the provision of another service,” confirming that Congress did not intend by

At the same time, there is no evidence that the competitive environment has changed meaningfully since the *Wireless Interexchange Opinion* was adopted. The factors that led both the Justice Department and the MFJ Court to conclude that significant conditions were necessary before BOCs could offer wireless interexchange services remain in place today. Moreover, Congress made no findings that would permit the Commission to conclude that the competitive environment that existed in 1995 no longer exists today. *See* Conference Report at 147. Thus, the *Wireless Interexchange Order* would justify more stringent safeguards for wireless services than those proposed in the Notice.

Moreover, it would be inappropriate for the Commission to impose safeguards for either wireless or landline services that are less burdensome for BOCs than for independent LECs. As described above, the risks to competition and consumers from BOC entry into interexchange markets are greater than those that result from independent LEC entry into those markets. The risks come from both the scope of BOC service areas and the sheer size of the BOCs as compared to other LECs. The risks of anticompetitive behavior are exacerbated by the extensive BOC out-of-region CMRS holdings. *See supra* Part II. In that context, the existing safeguards for independent LEC provision of interexchange services also establish the minimum acceptable level of safeguards for BOC interexchange services.

IV. Conclusion

The Commission has proposed reasonable safeguards for BOC provision of out-of-region interexchange services. These safeguards are necessary to limit the ability of BOCs to

this exception to permit BOCs to offer traditional interexchange services in conjunction with CMRS or other services covered by the exception. H.R. CONF. REP. No. 458, 104th Cong., 2nd Sess. 147 (1996) (the "Conference Report").